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In The

Supreme Court of the United States

October Term, 1996

IN RE ELLIOTT ABRAMS,

Petitioner.

On Petition For A Writ Of Certiorari To The District Of Columbia Court Of Appeals

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF OF THE PETITIONER

1. In sanctioning Petitioner Elliott Abrams for offenses that had been fully and unconditionally pardoned by President Bush, a majority of the District of Columbia Court of Appeals openly departed from at least a dozen decisions of this Court holding, in a variety of formulations, that a presidential pardon "blots out" and "obliterates" the offense itself, "so that in the eye of the law the offender is as innocent as if he never committed the offense." *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 380-81 (1867).[1] The majority preferred the "more reasonable

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[1] *See, e.g., Knote v. United States*, 95 U.S. (5 Otto) 149, 153 (1877) ("In contemplation of law, [a pardon] so far blots out the offense, that afterwards it cannot be imputed to [the offender] to prevent the assertion of his legal rights."); *Osborn v. United States*, 91 U.S. (1 Otto) 474, 478 (1875) ("The pardon, in releasing the offense, obliterating it in legal contemplation, . . . removes the ground of the forfeiture upon which the decree rests. . . . "); *Carlisle v. United States*, 83 U.S. (16 Wall.) 147, 151 (1873) ("All have agreed that the pardon . . . obliterates in legal contemplation the offense itself."); *United States v. Klein*, 80 U.S. (13 Wall.) 128, 147 (1871) (pardon "blots out the offence pardoned and removes all its penal consequences"); *Brown v. Walker*, 161 U.S. 591, 599 (1896) (pardoned offender "stands, with respect to such offense, as if it had never been committed"); *Armstrong v. United States*, 80 U.S. 154, 155 (1871) ("pardon granted upon conditions, blots out the offence, if proof is made of compliance with the conditions"); *United States v. Padelford*, 76 U.S. (9 Wall.) 531, 543 (1869) (the pardon "purged [the offender] of whatever offense against the laws of the United States he had committed by the acts mentioned in the [pardon], and relieved [him] from any penalty which he might have incurred"); *Boyd v. United States*, 142 U.S. 450, 454 (1892) ("disability to testify being a consequence . . . of the judgment of conviction, the pardon obliterated that effect").

approach to the effect of a pardon . . . suggested by Professor Samuel Williston in his landmark article" in the 1915 *Harvard Law Review*. Pet. App. 13. According to the majority, a presidential pardon operates only on a *conviction;* it does not reach, let alone "obliterate" the underlying offense itself, and the court may therefore discipline the pardoned offender, so long as the sanction is based on the underlying offense rather than on the conviction of the offense.

Bar Counsel for the District of Columbia ("Bar Counsel") argues that the "court of appeals properly distinguished Mr. Abrams' criminal conviction from his underlying misconduct," and that the court properly based Petitioner's disciplinary sanction on the latter rather than the former. Brief in Opposition ("Opp.") 7, 8. Bar Counsel, however, makes no attempt to reconcile the Court of Appeals' reasoning with the many plainly contrary holdings of this Court, which is not surprising in light of Bar Counsel's argument to the court below that this Court's leading pardon case, *Garland*, has greater "historical interest than precedential value." Brief of The Office of Bar Counsel at 7 (filed Nov. 19, 1993) in *In re Abrams*, 662 A.2d 867 (D.C. 1995). Thus, Bar Counsel, like the majority below, answers this Court's consistent line of pardon cases by simply rejecting them.

2. According to Bar Counsel, a presidential pardon prohibits only *punishment* for the pardoned offense, and "[t]he imposition of professional discipline does not constitute punishment. . . . " Opp. 6. This argument is

meritless, and none of the nine Judges of the Court of Appeals adopted it.[2]

Bar Counsel's argument is derived from the principle, recognized by both the majority and the dissenting judges below, "that the 'purpose in conducting disciplinary proceedings and imposing sanctions is not to punish the attorney; rather, it is to offer the desired protection by assuring the continued or restored fitness of an attorney to practice law.' " Opp. 7 (quoting Pet. App. 16); *see* Pet. App. 75 (dissenting opinion). The Court of Appeals has also consistently acknowledged, however, that "an unintended, yet inevitable, result of imposing a sanction on an attorney is that the attorney is penalized to some degree." Pet. App. 75 (dissenting opinion) (citing *In re Wild*, 361 A.2d 182, 184 (D.C. 1976)).[3] This is, after all, a *disciplinary* proceeding brought for the purpose of *sanctioning* an attorney. In any event, this Court has consistently held

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[2] The majority did not address Bar Counsel's claim that a pardon prohibits only punishment for the pardoned offense, although it recognized, as did the dissenting judges, that the *purpose* of bar discipline is not to punish the attorney, but rather to protect the public from unfit practitioners. Pet. App. 16-17. The dissenting judges addressed, and rejected, Bar Counsel's argument at length. Pet. App. 74-81.

[3] The distinction recognized by the Court of Appeals between the *nonpunitive purpose* of bar disciplinary proceedings and the *punitive effect* of bar discipline on the sanctioned lawyer can be traced to *Ex parte Wall*, 107 U.S. 265 (1883). Although this Court observed in *Wall* that the purpose of a disciplinary proceeding against a lawyer is not to punish but rather to protect the courts from "persons unfit to practice in them," it described the sanctions visited upon the attorney as "punishment." *Id.* at 273, 288.

that a disciplinary sanction, although "designed to protect the public, is a punishment or penalty imposed on the lawyer." *In re Ruffalo*, 390 U.S. 544, 550 (1968) (citing *Ex parte Garland, supra*). Indeed, the *Garland* Court spoke directly to the issue, concluding that disbarring Garland for treason "can be regarded in no other light than as punishment for such [pardoned] conduct." *Ex parte Garland*, 71 U.S. at 377; *see id.*, at 381 ("[T]o exclude him, by reason of that [pardoned] offense, from continuing in the enjoyment of a previously acquired right [to practice law], is to enforce a punishment for that offense notwithstanding the pardon.").[4]

But even if the imposition of a disciplinary sanction does not constitute "punishment" for the offense, it is undeniably a *consequence* of the offense. And a presidential pardon cleanses the offender of all official "consequences of his offense." *Knote v. United States*, 95 U.S. at 153; *see, e.g., Carlisle v. United States*, 83 U.S. at 151 (pardon "relieve[d] them from the legal consequences of their participation in the rebellion."); *Boyd v. United States*, 142 U.S. at 454 ("disability to testify being a consequence . . . of the judgment of conviction, the pardon obliterated that effect"). The sweeping effect of a presidential pardon follows from the fact that it "obliterates in legal

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[4] Bar Counsel concedes, as he must, that the sanction at issue in *Garland* – disbarment – constituted "punishment" for the offense of treason, but he contends that any sanction imposed upon Petitioner Abrams, including disbarment, would "not constitute 'punishment' in either a constitutional or a disciplinary sense," but rather would constitute only "discipline." Opp. 8. Bar Counsel does not further explain this inscrutable reasoning.

contemplation the offense itself." *Carlisle*, 83 U.S. at 151. If a pardoned offender "stands, with respect to such offense, as if it had never been committed," *Brown v. Walker*, 161 U.S. at 599, it follows that an attorney cannot be officially disciplined for a pardoned offense.[5]

3. Citing Petitioner's *pro se* concession before the Board of Professional Responsibility ("Board") that the pardon did not bar the imposition of professional sanctions, Bar Counsel suggests for the first time in this case that Petitioner may have waived his right to invoke the pardon's protection. Opp. at 11. Bar Counsel's suggestion fails for three reasons.

First, as noted in the Petition (Pet. 7 n.6), in light of the Board's prior decision in *In re Felt*, Bar Docket No. 329-77 (BPR DC App. Nov. 12, 1981), which held (erroneously) that a presidential pardon had no effect on a bar

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[5] Bar Counsel also contends that Petitioner's argument is foreclosed by *Carlesi v. New York*, 233 U.S. 51 (1914), which upheld the use of a prior pardoned offense to enhance the sentence imposed under a multiple-offender statute. As noted in the petition (Pet. 24 n.15), the *Carlesi* Court made clear that the enhanced punishment was not "in any just sense a punishment for such prior crime," but rather "is for the new crime only. . . . " 233 U.S. at 57-58. In the context of the instant case, *Carlesi* means that if Petitioner were to commit some disciplinary infraction in the future, his 1986 congressional testimonies could be considered, despite President Bush's pardon, in aggravation of any punishment imposed for the second infraction. The key point is that no sanction whatever can constitutionally be visited upon Petitioner for the pardoned offenses; Petitioner can be sanctioned if he commits a second disciplinary violation, for any such punishment "is for the new crime only."

disciplinary proceeding, Petitioner's concession on the pardon issue simply constituted an acknowledgment that the Board had already decided the issue against him and was bound by its earlier decision. The Court of Appeals was not, however, bound by the Board's decision in *In re Felt*, and Petitioner vigorously pressed his pardon argument before both the panel (successfully) and the *en banc* court (unsuccessfully).

Second, neither the Bar Counsel, nor the Hearing Committee, nor the Board, nor the panel, nor the *en banc* court viewed Petitioner's statements before the Board as a waiver of his rights under the pardon. To the contrary, Bar Counsel fully briefed the merits of the pardon issue in his filings before the Hearing Committee, the Board, the panel, and the *en banc* court; nowhere in Bar Counsel's extensive briefing on the pardon issue did he even mention Petitioner's concession, let alone rely on it as a binding waiver of Petitioner's rights under the pardon. If anything was waived below, therefore, it was Bar Counsel's claim that Petitioner waived his right to invoke the protection of the pardon. Similarly, both the panel and the *en banc* court below reached and decided the pardon issue on the merits. Thus, the question of the pardon's effect on this disciplinary proceeding is properly presented for this Court's review.

Finally, and most importantly, the effect of a presidential pardon is *jurisdictional* and thus cannot be waived. When the *en banc* court below raised this issue *sua sponte*, Bar Counsel stated that "[i]f the [panel's] reading [of the effect of a pardon] is correct, it would follow that the disciplinary system and this Court are *ousted of jurisdiction* to consider [Petitioner's] professional

misconduct and to impose ethical sanctions in response to it." Supplemental Memorandum of Bar Counsel, February 9, 1996 (emphasis added). This Court's precedents confirm that the view expressed by Bar Counsel below, rather than his newly minted suggestion to the contrary, is correct.

Again, a presidential pardon "obliterates in legal contemplation the offense itself," and thus "forever close[s] the eyes of the court to the perception of [the unlawful conduct] as an element in its judgment. . . . " *Carlisle*, 83 U.S. at 151. It follows that an unconditional presidential pardon is a *jurisdictional* bar to the imposition of punishment, including attorney discipline, for the pardoned offense. Accordingly, the dissenting Judges below correctly concluded that Petitioner's pardon had rendered the Court "powerless to act" on the Board's recommendation. Pet. App. 89.

The jurisdictional nature of a pardon was specifically addressed in *Biddle v. Perovich*, 274 U.S. 480 (1927). In holding that an offender is powerless to refuse an unconditional presidential pardon commuting his sentence from death to life imprisonment, the Court, in a unanimous opinion authored by Justice Holmes, addressed "the principles of pardons in the law of the United States":

> A pardon in our days is not a private act of grace from an individual happening to possess power. It is a part of the Constitutional scheme. When granted it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the

> judgment fixed. . . . Just as the original punishment would be imposed without regard to the prisoner's consent and in the teeth of his will, whether he liked it or not, the public welfare, not his consent determines what shall be done. So far as a pardon legitimately cuts down a penalty it affects the judgment imposing it.

Id. at 486. A presidential pardon granted after conviction thus operates on the judgment itself. It is wholly outside the offender's control.[6]

Here, Petitioner plainly could not have rejected the unconditional pardon granted by President Bush. And once the pardon was granted, it could not be waived, forfeited, or otherwise lost by Petitioner. The pardon "forever close[d] the eyes of the court to the perception of [the offense] as an element in its judgment," *Carlisle*, 83 U.S. at 151, and Petitioner's contrary concession before the Board simply did not and could not change that.

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[6] To the extent that Bar Counsel has suggested that *Burdick v. United States*, 236 U.S. 79 (1915), stands for the proposition that a pardon is not jurisdictional in nature, the Court's unanimous decision in *Biddle* clearly forecloses such an interpretation of *Burdick*.

CONCLUSION

For the foregoing reasons, and the reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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